



REPUBLIC OF KENYA



In re Estate of George Kung'u Wainaina (Deceased) (Citation Cause E112 of 2022) [2023] KEHC 21928 (KLR) (18 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21928 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CITATION CAUSE E112 OF 2022**

A MSHILA, J

AUGUST 18, 2023

IN THE MATTER OF THE ESTATE OF GEORGE KUNG'U WAINAINA (DECEASED)

BETWEEN

ROSEMARY WANGARI MWANGI 1ST CITOR

SERAH NJOKI KUNG'U 2ND CITOR

JOSEPH WAINAINA KUNG'U 3RD CITOR

AND

JOYCE WAMBUI KUNG'U CITEE

RULING

Background

1. The 1st Citor Rosemary Wangari Mwangi filed a Citation to accept or refuse letters of administration intestate to Joyce Wambui Kung'u being the 1st wife (widow) of the deceased and having refused to take out letters of administration to the estate of the deceased herein who died on 4/12/2011 despite several requests and/or attempts directed to her to comply.
2. On 27/09/2022, the Citee herein Joyce Wambui Kung'u entered appearance and subsequently filed a Notice of Preliminary Objection based on the following grounds;
 - a. That this Honourable Court lacks jurisdiction to hear and determine this matter as the same is Res sub-judice.
 - b. That the same prayers sought are similar to Thika High Court Elc Case No. 83 Of 2018, Rosemary Wangari Mwangi & Others Vs Joyce Wambui Kung'u & Others.
3. In reply to the Preliminary Objection, the 1st Citor filed a replying affidavit on 24th March, 2023. She deposed that the Citee being a widow to the deceased has refused to obtain letters of Administration



despite several requests. That her contention that this matter is sub-judice is misplaced. She deposed that in the ELC Case No. 83 Of 2018-thika, she had sought for injunctive orders against the Citee who had intentions of selling the properties of the deceased. She listed the properties of the deceased which she had a claim against that had been transferred by the Citee to third parties. The said properties are LR NO. Karai/Kamangu Township/T37, Karai/Karai/926, Nguruibi/Thigio/1553, Dagoretti/Mutuini/333, Dagoretti/Mutuini/478, Muguga/Gitaru/1426. She had also sought that the Citee be compelled to commence succession proceedings in respect of the deceased's estate. She averred that she did not pray that the ELC court should issue a grant or distribute the estate. She further deposed that the Citee had filed Succession Cause No. 1633 Of 2015-Nairobi where she applied to have the grant issued therein on 23/10/2015 revoked as the same had been issued without her knowledge. The same was revoked on 23/11/2021 and the parties were directed to move the court appropriately. She contended that what was pending in the ELC court was determination on proprietorship. She urged the court to dismiss the Preliminary Objection.

4. The Preliminary Objection was canvassed by way of written submissions.

Written Submissions

5. The Citor submits that the ELC suit causing the Citee to claim that the matter herein is sub judice relates to injunctive reliefs to restrain the Citee from disposing of the deceased's estate and not for issuance of grant or distribution of the deceased's estate as such the same cannot be said to be sub judice. The court herein is said to be clothed with jurisdiction to handle probate and succession matters.
6. The Citee submits that in the ELC case the Citor sought for the Citee to be directed to commence succession proceedings in respect of the deceased's estate upon conclusion of the case failure to which the Citor be at liberty to do so. In the circumstances, the Citee submits that there exists two suits which arise from the same set of circumstances and raise similar questions of law as such the Preliminary Objection should be upheld and the citation be dismissed with costs.

Issues For Determination

7. Having considered the Preliminary Objection and the submissions by the parties herein the main issue for determination is whether the court herein lacks jurisdiction and whether the succession cause herein is sub-judice.

Analysis

8. Having considered the pleadings, the Preliminary Objection and the rival submissions. The first issue for determination is whether this court has the requisite jurisdiction to determine the citation herein as guided by the principle that jurisdiction is everything. Refer to the renowned case of *Owners of the Motor Vessel "Lilian S" Vs Caltex Oil (Kenya) LTD* (1989) where the Court held that:-

“Jurisdiction is everything. Without it, a court has no power to make to take one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law must down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

9. The Citee argues that this Honourable court lacks jurisdiction to hear and determine this matter as the same is res sub-judice for the reason that the Citors herein had filed a similar suit seeking similar orders in ELC Case No. 83 Of 2018-Thika which matter is still pending in court. The Citor in the said ELC case had sought for among other prayers that the Citee be directed to commence succession



- proceedings with respect to the deceased's estate within 30 days from the date of the judgment failure of which the Citor be at liberty to do so.
10. The Citor argues that she was seeking injunctive reliefs against the Citee who was intending to sell the deceased's properties. She averred that she did not pray to be issued with a grant by the ELC court and further that she did not request the ELC court to distribute the deceased's estate.
 11. Section 6 of the *Civil Procedure Act* provides that:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
 12. The purpose of the sub judice rule is to prevent the filing of multiple suits between the same parties or those claiming under the same subject matter so as to avoid an abuse of the court process.
 13. Refer to the case in *Mukbisa Biscuit Manufacturers Limited –Vs– West End Distributors Limited* (1969) E.A 696 where the Court of Appeal stated that;

“So far as I am aware a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleading and which if argued as a Preliminary Objection may dispose of the suit”
 14. The Citee did attach the Plaintiff which shows that same parties and properties as the ones in the Plaintiff are the subject of litigation in the citation herein. In the said Plaintiff, the Citor/Plaintiff therein made a prayer to the ELC court to among other orders, order that the subdivisions, transfer, sale to third parties of land parcels no. Karai/Kamangu Township/T37, Karai/Karai/926, Ngruibi/Thigio/1533, Dagoretti/Mutuini/333, Dagoretti/Mutuini/478 and Muguga/Gitaru 1426 was unprocedural, illegal, fraudulent, void ab initio and are hereby revoked or cancelled.
 15. This then means that the said properties have already been alienated by the Citee as such the said properties the subject matter in the citation herein are not registered in the deceased's name. This being a probate court, it only deals with properties that have been ascertained to form part of the deceased's estate. As it stands now, there is a pending dispute at the ELC court in respect of the ownership of the afore mentioned suit properties. In any case, the Citor did make a prayer before the said court that the Citee should be directed to commence succession proceedings within 30 days after judgment in regard to the deceased's estate failure to which the Citor be at liberty to do so. It is this courts considered view that the Citation herein is premature, being that the suit at the ELC court is still pending where the ownership of the suit properties ought to be determined. The probate court herein cannot proceed with distribution of deceased's assets that have not been ascertained as it lacks the requisite jurisdiction to deal with issues touching on ownership of property.
 16. In the circumstances, this court is satisfied that the Preliminary Objection on jurisdiction is properly before this court.

Findings and Determination

17. For those reasons this court makes the following findings and determinations;
 - i. This court finds that Preliminary Objection is merited and it is hereby upheld.



- ii. The Citation is found to be premature and it is hereby struck out;
- iii. The final orders issued in the ELC case will guide the way forward in the administration and distribution of the deceased's estate before the probate court.
- iv. Each party to bear own costs
- v. Case marked as closed

Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 18TH DAY OF AUGUST, 2023.

A.MSHILA

JUDGE

In the presence of;

Mourice – Court Assistant

Macharia – for Citor

Okello – for Citee

